No. 12,056

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE W. BOULTER and
MARGRETTA L. BOULTER,
Appellants,

vs.

COMMERCIAL STANDARD INSURANCE
COMPANY, a corporation,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLANTS.

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The parties herein will be referred to by their designations in the District Court, viz., appellants as "plaintiffs" and appellee as "defendant". Reference to the printed Transcript of Record will be indicated by the letter "T." followed by page number.

PRELIMINARY STATEMENT.

Defendant insurance company issued to its insured an automobile public liability policy. Plaintiffs recovered a final judgment in a state court against its

insured for injuries received in an accident with a vehicle covered by the policy. The instant action was commenced in a state court and removed to and tried in the District Court because of diversity of citizenship. Judgment was entered for plaintiffs upon a jury's verdict, after which the District Court granted a motion for a directed verdict pursuant to a reservation of ruling thereon, and judgment was thereupon entered in favor of defendant. This appeal is from said order and said judgment.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION.

The complaint was filed in the Superior Court of the State of California in and for the City and County of San Francisco (T. 2). In it plaintiffs seek judgment against defendant for the aggregate amount of $5,118.76 and interest pursuant to the provisions of an automobile indemnity insurance policy executed by defendant.

Prior to the time in which the defendant was required by the laws of the state or the rules of the court in which said action was brought to answer or plead to said complaint, it filed in the State Court its verified petition for removal of cause to the United States District Court for the Northern District of California, Southern Division (T. 205), notice of intention to file petition and bond for removal of cause to the United States District Court and of motion for order for such removal, which notice was duly served

on plaintiffs (T. 203), and bond referred to in the foregoing notice (T. 208) (28 U.S.C.A. Sec. 72). Thereafter and pursuant to said notice an order was duly given and made by said Superior Court ordering the removal of said cause to said District Court (T. 210).

Said petition discloses that the plaintiffs are residents of the State of California, and that the defendant is a corporation duly organized and existing under the laws of the State of Texas; that the controversy is wholly between citizens of different states and which can be fully determined as between them (28 U.S.C.A. Sec. 71); and that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 (28 U.S.C.A. Sec. 41 (1)).

After the case was removed to the District Court defendant filed its answer therein (T. 9), plaintiffs demanded a jury (T. 43) and the cause was tried before a jury. The verdict of the jury awarding to plaintiffs the amounts prayed for in the complaint was returned and filed on July 7, 1948 (T. 47), and judgment was entered on said verdict on July 9, 1948 (T. 47a).

On July 12, 1948, there was filed a motion of defendant for a judgment notwithstanding the verdict and in the alternative for a new trial (T. 48), and on July 26, 1948, a decision and order were made by the District Court that the motion of the defendant for a directed verdict, on which ruling had been reserved, be granted, that the verdict and judgment for the plaintiffs be set aside, and that judgment be entered

for the defendant that plaintiffs take nothing by their complaint, and that the motion for new trial be denied (T. 51-52). Pursuant to and in accordance with said decision and order, judgment was signed and filed on August 5, 1948, and entered on August 6, 1948 (T. 75).

Notice of appeal to the United States Court of Appeals for the Ninth Circuit, appealing from said decision and order and from said final judgment, was filed by plaintiffs with the District Court on August 18, 1948 (T. 77). An appeal from said order and judgment to the Circuit Court of Appeals is provided by 28 U.S.C.A., Section 225, and said appeal was perfected within the time limit provided by 28 U.S.C.A., Section 230, and by Section 732 of the Rules of Federal Procedure.

STATEMENT OF THE CASE.

The Pleadings.

In their complaint (T. 2) plaintiffs seek to recover from defendant on an automobile public liability policy issued by it to one Warner and Woodrow pursuant to California Highway Carriers' Act, Sections 5 and 6, Deering's California General Laws, Act 5129a. It is alleged therein that plaintiffs were injured by a tractor owned and operated by Warner and Woodrow that was covered by said policy and while it was in effect, and that a judgment for the damages arising therefrom was recovered by plaintiffs against Warner and Woodrow in the State Court; and that the judgment has become final and is wholly unsatisfied.

The material allegations of the complaint are established by the admissions in the answer (T. 9), request for admission of facts (T. 44), statement of defendant, Commercial Standard Insurance Company, in reply to plaintiffs' request for admission of facts (T. 45), oral stipulation during trial (T. 94), and the uncontradicted testimony of Noel Coleman, assistant secretary of California Public Utilities Commission (T. 82-93). The answer, however, pleads several affirmative defenses which present the only controversial issues here involved. A copy of the policy is attached to the answer (T. 25), from which, however, a relevant endorsement was inadvertently omitted (T. 44-45; 86-92).

With the exception of paragraph VII of the answer (T. 13-21), which was stricken out by the court (T. 98-99), and the allegation that the policy did not cover the tractor while it was separated from the trailer (T. 4), which defense was not urged nor considered by the trial court (see Declaration 6 of policy (T. 25)), the defense is based solely on the following provision of the policy, which is set forth in the answer:

> "The Automobiles described are and will be used only for transportation of merchandise purposes and will be operated as follows, and this insurance covers for no other use or operation".

The allegations based on this provision are that at the time of the accident Warner, who was then driving, was not operating the tractor under authority of the Highway Carriers' Act, nor was he using it for the

transportation of merchandise, but on the contrary it was being used in violation of the above quoted provision, to-wit: for the purpose of transporting himself and his family on a vacation trip, and for the purpose of carrying himself and his wife home from such trip, and for pleasure purposes of himself and his wife (T. 11-13).

The Trial.

A jury was demanded by plaintiffs, and the case was tried by jury (T. 43). After establishing the facts alleged in their complaint by admissions in the pleadings, testimony of Noel Coleman, and the stipulation referred to above, plaintiffs rested (T. 94). The defendant thereupon moved for a dismissal under Section 41b of the Federal Rules of Civil Procedure on the ground that the plaintiffs did not meet the defense raised in the answer and prove that at the time of the accident the assured was engaged in the transportation of merchandise (T. 95-96). The Court ruled that the plaintiffs had established a *prima facie* case, and denied the motion (T. 96-97).

Defendant thereupon called its assured, Allen J. Warner, as its witness (T. 100), and so far as it is revelant to the issues here involved, and without attempting to reconcile conflicts therein, his testimony on direct examination was substantially as follows:

On June 22, 1946, he was in partnership with Robert W. Woodrow (T. 100), and they were engaged in the transportation of property for hire (T. 101). In this business he used a Dodge tractor and trailer (T. 101), and he operated out of 10 Ord Court, San

Francisco (T. 102). He had no definite route; he wildcatted, which means that he has no definite over-the-road operation of his own, so he subhauls for big contractors (T. 103). On June 22, 1946, he was involved in an accident with the Dodge tractor about two miles south of Scotia in Humboldt County (T. 103-104). He was returning with his wife to San Francisco after leaving the trailer at Blue Lakes (T. 105). He had gone to Blue Lakes a week prior with the trailer, and he was taking 700 feet of pipe and a load of furniture to his sister, for which he was paid (T. 106). He left the pipe and trailer at Willow Creek, and headed back to San Francisco with the tractor, it having been his intention to get a load out of Willow Creek for San Francisco, but there was nothing then coming out of that territory (T. 107). His sister lives there, and at the time he took the lumber, pipe and furniture up he spent his vacation there (T. 109). When he left the trailer, it had not as yet been unloaded (T. 110), and his purpose for returning to San Francisco was to pay an instalment due on the policy in question. It was on this trip that the accident to plaintiffs occurred (T. 111). While he was at Willow Creek he had solicited business (T. 112-113). After the accident he continued on to San Francisco, paid his premium to the insurance company, had his tractor repaired, and then he returned to Willow Creek for his trailer (T. 114-115). Everything had been unloaded from the trailer, and he came back empty (T. 115). A trip to San Francisco without the trailer would enable him to hasten back to pay the premium on the policy, and he intended to pick up

the trailer later (T. 118). At the time of the accident he was not carrying any load or anything in the tractor (T. 119). On his return to San Francisco with the trailer there was a big range and some other stuff that belonged to his sister, for which he was paid $64 for transporting (T. 120-121).

His testimony on cross-examination was as follows:

The witness was brought before Judge Goodman at the request of Mr. Bledsoe, one of the attorneys for the defendant herein, at which time he gave certain testimony (T. 123).

"Mr. Bledsoe. Q. This trip was in the nature of a vacation trip for you, wasn't it?

A. It was a combination.

Q. What was the nature of the combination?

A. Business had been very slow about that time of the year and we had gone up into Willow Creek for an outfit up there, California Barrel. We had intended, if possible, to haul barrels out of Willow Creek.

Q. Did you see someone while you were up there about that?

A. No, I did not.

Mr. Gray. Q. Now in this hearing before Judge Goodman, Mr. Warner, did you testify to anything about stoves, pipe, or furniture?

A. No, I didn't.

Q. Nothing was said about that?

A. (Witness nodded in the negative.)

Q. Now this tractor that is in your insurance policy is the same tractor as involved in this accident, is that right?

A. That's right.

Q. Now were you paid for taking this pipe and other material up there?

A. Yes, sir, I was.

Q. How much were you paid?

A. $75."

(T. 124-125.)

At the time of the accident he was taking the most direct route from Willow Creek back to San Francisco (T. 126), and at the time of the accident he was not on his vacation (T. 127). One of his purposes in returning was to discuss with one Dowdell the hauling of a load (T. 127). He left the articles in the trailer as an accommodation to his sister (T. 128). In wildcatting he frequently leaves his trailer with merchandise to be unloaded while he does something else, and this is a customary and usual thing (T. 129). Wildcatting means that he frequently takes his equipment and goes from place to place and hauls for whoever will hire him (T. 138). He does not necessarily start from San Francisco, but from any place where he happens to be where he can locate a job. It is common practice to sometimes take a trailer that is already loaded instead of his own trailer, and attach this to his tractor for some company who has a load, and Dowdell has such trailers (T. 138-139). In wildcatting he has many times used his tractor only for hauling commodities (T. 141).

After the taking of the evidence was concluded, the defendant moved for a directed verdict (T. 198) on all the grounds specified by it on the preceding day, namely: "that it has been shown by evidence that at

the time this accident happened, the vehicle, the Dodge tractor, was not being used for the transportation of merchandise within the meaning of the policy which is in evidence" (T. 136-137). The court reserved its ruling on the motion for directed verdict until after the verdict, under the provisions of Section 50 (b) of the Federal Rules of Civil Procedure (T. 199).

The case was thereafter submitted to the jury, and its verdict was returned in favor of plaintiffs for the amounts prayed for in the complaint (T. 47), and judgment was entered thereon (T. 47a).

Post Trial Proceedings.

Following the entry of judgment defendant filed a written motion for judgment notwithstanding the verdict and in the alternative for a new trial (T. 48). Thereafter the District Court rendered and filed an opinion (T. 53) (78 Fed. Supp. 895), and upon the grounds stated therein the court filed its decision and order that the motion of defendant for a directed verdict, on which ruling had been reserved, be granted; that the verdict and judgment for the plaintiffs be set aside, and that judgment be entered in favor of defendant; and that the motion of defendant for a new trial be denied (T. 51-52). Judgment upon this order was thereupon entered (T. 75). The appeal herein is taken from said order and judgment (T. 77).

Questions Involved.

The judgment here appealed from being one that was entered notwithstanding a verdict of a jury to the contrary, the questions involved are:

1. Did plaintiffs establish a *prima facie* case?

2. Which party had the burden of proving the matters affirmatively pleaded in the answer?

3. Can plaintiffs' *prima facie* case be overcome *as a matter of law* by: any testimony adduced by defendant; or the testimony of one witness called by defendant which the trial court described as a story that is inherently improbable, bearing almost on the fantastic (T. 57)?

4. Did the jury have the right to conclude that the vehicle was being used for transportation of merchandise purposes?

Each of these questions will be discussed in the argument following under appropriate titles.

SPECIFICATION OF ERRORS.

1. The District Court erred in granting the motion of the defendant for a directed verdict, on which ruling had been reserved.

2. The District Court erred in making an order that the verdict and judgment for the plaintiffs be set aside and that judgment be entered for the defendant that plaintiffs take nothing by their complaint.

3. The District Court erred in rendering and causing to be entered a judgment in favor of the defendant that plaintiffs take nothing by their complaint against defendant, that the complaint be dismissed on the

merits, and that defendant recover from plaintiffs its costs of suit.

ARGUMENT.

On June 22, 1946, at the time of the accident here involved, Warner and Woodrow were operating under a Highway Carrier Permit issued by the Railroad Commission of the State of California (T. 83-84), and they were engaged in the business of transporting property for hire (T. 100-101). As a condition for granting this permit they were required to obtain a policy of insurance, and the policy here involved was issued to them (T. 84), and was in full force and effect at the time of the accident (T. 87). One of the declarations in the body of the policy provides:

> "5. The Automobiles described are and will be used only for transportation of merchandise purposes and will be operated as follows, and this insurance covers for no other use or operation".
>
> (T. 25.)

This policy was admitted in evidence as plaintiffs' exhibit No. 1 (T. 88). Attached to this policy is an endorsement required by the Railroad Commission (T. 89) which provides:

> "* * * that within the classes of coverage provided by the policy it will pay any final judgment rendered against the insured for bodily injuries to or death of any person or persons other than the named insured, or damage to or destruction of property, or both, arising out of the owner-

ship, maintenance or use of any vehicle operated under authority of the aforesaid statutes, although such vehicle may not be specifically described in the policy; that the judgment creditor may maintain an action in any court of competent jurisdiction to compel such payment; that the right of any person, firm or corporation to recover under the policy shall not be affected by any act, omission, or misrepresentation of the insured or his employees with regard to any warranty, condition, declaration, or provision of the policy; and that the policy shall remain in full force and effect notwithstanding such act, omission or misrepresentation or the violation of any warranty, condition, declaration or provision of the policy by the insured or his employees; Provided, However, that this endorsement shall not be construed to impose any obligation on the Company for which it would not be liable independently hereof with respect to * * * (4) any loss arising out of any operations of the insured except operations authorized or for which authorization is required under the aforesaid statutes. * * *

"The Company further agrees that this endorsement shall prevail over any conflicting provision in the policy or in any other endorsement now or hereafter attached thereto or made a part thereof".

(T. 89-91.)

The right of the plaintiffs to sue the defendant on the policy is provided by the provisions of the policy itself (T. 39) and by Section 11580 of the Insurance Code of the State of California.

THE PLAINTIFFS ESTABLISHED A PRIMA FACIE CASE.

It would only serve to unnecessarily burden this brief to review the admissions in the pleadings, the evidence, and stipulation of counsel, which together establish every fact alleged in the complaint. Suffice it to say that the case was tried on this theory, which is illustrated by the fact that at the time plaintiffs rested defendant moved for a dismissal under Rule 41b upon the sole ground that to entitle plaintiffs to recover they had the burden of proving that at the time of the accident the tractor was being used only for the transportation of merchandise (T. 95-96). That the allegations of our complaint were established is further illustrated by the statement of the trial court in denying the motion of defendant for dismissal (T. 97).

> "So I feel that in this case a prima facie case has been shown when they produce a judgment of the Court in addition to the other facts, which shows a recovery against them for injury caused by their truck and the conditions of liability are general and imposed by statute; the limitation becomes an exception, which it is duty of the defendants to prove."
>
> (T. 96.)

The effect of *prima facie* evidence and of a *prima facie* case is aptly described in the case of *Miller & Lux Inc. v. Secara,* 193 Cal. 755 (227 P. 171), wherein the Court at pages 770-771 states:

> " '*Prima facie* evidence is that which suffices for the proof of a particular fact until contradicted and overcome by other evidence.' (Code Civ.

Proc., sec. 1833.) It is to be noted that the code does not say 'until contradicted *or* overcome by other evidence,' but 'until contradicted *and* overcome by other evidence.' Therefore, when *prima facie* evidence of a given fact has been introduced, its effect is not destroyed by the introduction of contradictory evidence. It stands as *proof* of that particular fact unless and until it is *both contradicted and overcome* by such other evidence. 'Proof' is something more than merely 'evidence.' It is 'the establishment of a fact by evidence.' (Code Civ. Proc., sec. 1824.)''

THE DEFENDANT HAD THE BURDEN OF PROVING THAT THE TRACTOR WAS NOT BEING USED FOR TRANSPORTATION OF MERCHANDISE PURPOSES.

Neither the defendant nor the trial judge has at any time questioned the sufficiency of our complaint to state a cause of action, nor the sufficiency of the admissions and evidence to establish its allegations. Hence, the only question remaining on this subject is whether it was incumbent upon plaintiffs to have gone further and negated the affirmative defenses pleaded in the answer. During the trial the District Judge held that this burden was not imposed upon plaintiffs (T. 96), and he does not in his written opinion (T. 53) directly discuss this point except to state:

> ''It is to be borne in mind that we are interpreting a contract which contains a condition or limitation of liability, regardless of whom has the burden of the proof.''
>
> (T. 58.)

In support thereof the learned judge cites *Zohner v. Sierra Nevada L. & C. Co.,* 114 Cal. App. 85, 90, and *Ells v. Order of United etc. Travelers,* 20 Cal. (2d) 290, 304. In the *Zohner* case the rule that we contend was there stated on the page cited.

> "It is fundamental that the burden was upon appellant (insurance company) to show that the circumstances brought the case within the exception of the policy and this burden appellant failed to meet."

The *Ells* case merely reenunciates the familiar rule that in an action on an accident policy it is incumbent upon the person claiming thereunder to establish that the death was caused by accident.

The distinction between the necessity of a plaintiff proving that the death of a decedent was caused by an accident and the necessity of a defendant proving that the death resulted from perils which were excepted risks under the policy appears in the case of *Davilla v. Liberty Life Ins. Co.,* 114 Cal. App. 308 (299 P. 831), wherein the court states:

> "The burden of proving that death resulted from the two specified causes, i.e., the risk covered, rested upon respondent. (plaintiff) (p. 313) * * *
>
> "In considering appellant's (defendant) claim that the evidence establishes, as a matter of law, that insured's death was 'contributed to or caused by voluntary exposure to unnecessary danger' and occurred 'while violating the law', it must be remembered that these perils were excepted risks as to which appellant had the burden of proof." (p. 317).

In *Zenner v. Goetz,* 324 Pa. 432, 188 A. 124, the defendant insurance company claimed that after a verdict and judgment for plaintiffs its motion n. o. v. should have been granted, in that testimony offered by it established that the insured was carrying passengers for compensation contrary to the provisions of the policy.

> "At the trial appellant's defense was that defendant at the time of the accident was transporting passengers for compensation and consequently his insurance policy did not cover the liability assumed by the company. It contended, then as now, that to recover against it, plaintiff was required to show compliance by defendant with all the terms of his policy, including the fact that when the accident occurred the latter was not engaged in carrying passengers for hire. Plaintiff's position is that this was a matter of affirmative defense, constituting an exception to the general risk insured against, which the garnishee was compelled to show in order to escape liability. Plaintiff rests upon the proposition that the duty of coming forward with evidence was the garnishee's after plaintiff had made out what he contended was a prima facie case.
>
> "When plaintiff proved that the liability had been incurred by defendant, in the form of a judgment entered against him, and that this was a liability explicitly insured against by appellant's issuance of a policy then in force, he did make out a prima facie case which entitled him to have the issues submitted to the jury. That he made out his case largely through appellant's admissions was immaterial. He was not required

> in addition to show that none of the risks excepted in the policy, of which carrying passengers for hire was only one, were present when the accident occurred. When a defendant seeks to avail himself of a substantive defense reserved in a policy of insurance, when he relies upon a fact specifically mentioned in a policy as relieving him of a liability generally assumed in the policy, the defense becomes an affirmative one and the defendant at that point must shoulder the duty of coming forward with evidence in support of what he affirms. See Bowers v. Great Eastern Casualty Co., 260 Pa. 147, 103 A. 536; Watkins v. Prudential Ins. Co., 314 Pa. 497 at 508, 173 A. 644, 95 A. L. R. 869; and Home Benefit Ass'n v. Sargent, 142 U. S. 691, 12 S. Ct. 332, 35 L. Ed. 1160. * * * If the burden was on plaintiff in the present case to negative the risk excepted in the policy, 'it would necessarily follow that, for the same reason, he was required to establish the nonexistence of all the other stringent provisions by which the policy might be avoided,' as this court said in Fisher v. Fidelity Mutual Life Ass'n, 188 Pa. 1, 13, 41 A. 467, 468." (188 A. 125-126.)

In that case as in this the defendant attempted to draw an analogy between a policy similar to the one in the instant case and fire insurance and accident policies, claiming that in both the latter it is necessary for the plaintiff in one to prove that the loss was caused by fire and in the other by accident. In distinguishing between those cases and an indemnity case, the court stated:

> "Appellant places its chief reliance on cases applying the well-established rule that in a suit

> on a policy insuring against death by 'external, violent and accidental' means, the beneficiary, to make out a prima facie case, must prove not only death but the fact that it was caused by violence or accident, citing Watkins v. Prudential Ins. Ass'n, supra, and Walters v. Western & Southern Life Ins. Co., 318 Pa. 382, 178 A. 499. In these cases the express condition of liability was not proof of death alone, but proof of death by accident. Accidental death is in such cases an operative fact and on plaintiff there always rests the duty of proving all such facts in order to recover on a contract." (188 A. 126.)

Again in *Center Garage Co. v. Columbia Ins. Co.,* 96 N. J. L. 456, 115 A. 401, the Court of Errors and Appeals of New Jersey stated:

> "Clauses contained in policies of insurance which provide that the policy shall be void or the insurer relieved of liability on the happening of some event or the doing of or omission to do some act are not in any sense conditions precedent. If they are conditions at all, they are conditions subsequent, and constitute matters of defense, which, together with their breach, must be pleaded by the insurer to be available as a means of defeating a recovery on the policy; and the burden of establishing the defense, if controverted, is, of course, upon the party pleading it. Joyce on Insurance, vol. 4, par. 2190, and cases cited." (115 A. 402.)

In *The Law of Insurance—Joyce,* 2d Edition, Volume 5, pages 6221-2, the following appears:

> "§ 3796a. *Excepted risks: burden of proof: evidence as to.*—If a risk is excepted by the terms

> of a policy which insures against other perils or hazards such exemption from liability constitutes a defense which the insurer may urge, for it has not assumed that particular risk or risks and the burden rests upon insurer if it intends to take advantage of such exemption, so that it must allege and prove that the loss or a part thereof fell within the same."

In *Arbuckle v. Lumbermens Mut. Casualty Co. of Illinois,* 129 F. (2d) 791, 793 (C. C. A. 2d 1942), the court stated:

> "Although the plaintiff had the burden of proving the policy and that it covered Newman's automobile the judge correctly charged that the burden of proving a breach of the condition that the car would be kept and used principally in Calicoon or vicinity was upon the defendant."

The foregoing establishes the general rule applicable to the question. However, this case having arisen in California, and being in the Federal Court solely because of diversity of citizenship, in applying the law the Federal Court is in effect a State Court:

> "For purposes of diversity jurisdiction a federal court is 'in effect, only another court of the State'."
>
> *Angel v. Bullington,* 300 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832.

Furthermore, the laws of California govern a Federal Court's construction of the policy (*Ocean Accident & Guarantee Corp. v. Torres,* 91 F. (2d) 464, 467 (9th C.C.A. 1937)).

With this in mind we now direct attention to the decisions of the California courts. In 14 *Cal. Jur.* at page 618, the general rule is thus stated:

> "When the plaintiff has established a prima facie case, and the insurer claims exemption by reason of a breach of a proviso or condition subsequent, the burden rests upon it to prove that a loss, or a part thereof, falls within one of the prohibitive clauses of the policy, or, in other words, to prove the exception or breach relied on as defeating the plaintiff's prima facie case."

In *Dennis v. Union Mut. Life Ins. Co.,* 84 Cal. 570 (24 P. 120), one of the cases cited in support of the above text, it is stated:

> "Thus one seeking to recover on an insurance policy must aver the loss and show that it occurred by reason of a peril insured against, but he need not aver the performance of conditions subsequent, nor negative prohibited acts, nor deny that the loss occurred from the excepted risks. (*Blasingame v. Home Ins. Co.,* 75 Cal. 635.) *Therefore the burden of proof was not upon the plaintiff to show what it was unnecessary to allege in his pleadings, and the court was right in its rulings.*" (Page 572.) (Italics added.)

See also:

Rossini v. St. Paul Fire etc. Ins. Co., 182 Cal. 415, 420 (188 P. 564);

Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 425 (213 P. 42);

Bebbington v. Cal. Western etc. Ins. Co., 30 Cal. (2d) 157 (180 P. 673);

Bennett v. Northwestern Nat. Ins. Co., 84 Cal. App. 130, 137 (257 P. 586);

Mattson v. Maryland Casualty Co., 100 Cal. App. 96 (279 P. 1045).

In the case last cited the court at page 98 stated the rule as follows:

> "It was sufficient for the plaintiff to prove the loss and that it occurred by reason of the peril insured against, and the burden of showing that the loss was produced through some excepted cause was upon the defendant (citing cases). The testimony in support of the allegations of the complaint was sufficient *prima facie* to have that result; and where this is true a motion for a nonsuit should be denied."

Cardoza v. West American Com. Ins. Co., 6 Cal. App. (2d) 500 (44 P. (2d) 668), was an action against the defendant insurance company to recover on an automobile indemnity policy. One of its defenses was that at the time of the accident the operator was conveying a passenger for consideration, which under the terms of the policy relieved it from liability. In considering this question the court reiterated the rule:

> "The burden was on the defendant to prove its allegation that the policy was rendered void for the reason that the car was being used at the time of the accident to convey a passenger for hire." (Page 502.)

PLAINTIFFS' PRIMA FACIE CASE WAS NOT OVERCOME BY THE TESTIMONY OF DEFENDANT'S WITNESS AS A MATTER OF LAW.

In his opinion the trial judge further states:

> "Liability does not attach unless the truck, whether alone or with the trailer attached, was actually being used in the transportation of merchandise for hire. And when the facts are not disputed—whether the truck was, at the time of the accident, engaged in the sole activity covered by the policy is a question of law for the court." (T. 58.)

This is couched on the theory that the undisputed evidence establishes that the truck was not *actually* being used in the transportation of merchandise. In order to so conclude, it would be necessary to usurp the function of the jury and (1) base this conclusion on selected parts of the testimony of Warner, a discredited witness called by defendant, and (2) disregard that portion of the testimony of Warner indicating that the use being made of the tractor at the time of the accident was incidental to the operation of his business of transporting merchandise.

That the witness, Warner, was discredited is fully shown in the opinion, wherein the trial judge in referring to his testimony states:

> "His story is contradictory. The version he gave on the first day of the trial as to the object of his trip from San Francisco differs from that which he told at the trial in the Superior Court, and at a hearing in this court in an action for declaratory judgment, to which he was made a party,

and in which a declaration of non-coverage was secured against him and his co-partner. * * *"

(T. 55.)

"We are confronted here with the inherent improbability of a story, which bears almost on the fantastic."

(T. 57.)

Regardless of the opinion entertained by the trial judge as to the credibility of the witness, it was the prerogative of the jury to pass on his credibility. Thus, in the case of *Wendorff v. Missouri State L. Ins. Co.,* 318 Mo. 363, 1 S.W. (2d) 99, 57 A.L.R. 615, the Court stated:

"The defense thus tendered was an affirmative defense, and, as appellant says, the burden was on respondent to establish it. (citing) It is furthermore the general rule in such circumstances that the plaintiff's case cannot be taken from the jury, for he has the right to have the jury pass on the credibility of the defendant's witnesses and the weight of their testimony, though uncontroverted. (citing) But the rule has its exceptions. When the proof is documentary, or the defendant relies on the plaintiff's own evidential showing (or evidence which the plaintiff admits to be true), and the reasonable inferences therefrom all point one way, there is no issue of fact to be submitted to the jury." (57 A. L. R. 618-19.)

The same result was obtained in *Anthony v. Mercantile Mutual Accident Association,* 162 Mass. 354, 38 N. E. 973, 26 L. R. A. 406, wherein the Massachusetts Supreme Judicial Court stated:

"The burden being on the defendant to prove that it was from one of the excepted causes, the question remains whether the jury should have been instructed as a matter of law that the burden was sustained. It is not often, where a party has the burden of proving a fact by the testimony of witnesses, that the jury can be required by the court to say that the fact is proved. They may disbelieve the witnesses. If the conclusion is to be reached by drawing inferences of fact from other facts agreed, ordinarily the jury alone can draw these inferences. It is only when no inferences are possible except those which lead to one conclusion that the jury can be required to find a proposition affirmatively established." (26 L.R.A. 407.)

It is difficult to conceive, and we have found no cases holding, that a directed verdict can be granted upon evidence offered by a defendant after a plaintiff has once established a *prima facie* case. In *Peterson v. Chicago & A. Ry. Co.*, 265 Mo. 462, 178 S.W. 182, 187, the Court in discussing this question stated:

"As held in paragraph 1 of this opinion that. the plaintiff having made out a prima facie case, then according to the rule just announced the burden rested upon the defendant to disprove and overcome that case, to the satisfaction of the jury. That, of course, means that the jury and not the court must pass upon the credibility of the witnesses and the weight to be given their testimony. *That is, that after a prima facie case has once been made out, the case can never be taken from the jury.*" (Italics added.)

Again in the case of *Lederer v. Railway Terminal & Warehouse Co.,* 346 Ill. 140, 178 N. E. 394, 77 A.L.R. 1497, the Illinois Supreme Court stated:

> "If the evidence in support of the plaintiff's allegations is sufficient to make a prima facie case, the trial court is not authorized to direct a verdict for the defendant because of evidence of contrary facts tending to an opposite conclusion." (77 A.L.R. 1500.)

The defendant in the court below and the trial judge in his opinion place considerable emphasis on cases that uphold the defense of insurance companies where the vehicle at the time of the accident is being used for a purpose contrary to the terms of the policy (T. 62, 63). Principal among these cases is *Foster v. Commercial Standard Insurance Company,* 121 F. (2d) 117 (C.C.A. 10th, 1941). We take no issue with the rule enunciated in that case and the others cited, as we have never contended and do not now contend that where such defense is established an insurance company cannot be relieved of liability. The significant thing, however, is that *in all of these cases the nonconforming use of the vehicle was either expressly admitted by the claimant or not made an issue.* This fact clearly appears in that portion af the *Foster* case that is quoted in the opinion. " 'The damage *admittedly* was incurred while the insured was operating the truck for pleasure and outside the coverage of the policy?' " (T. 63—italics added.) Obviously, under such circumstances there can be no question concerning this fact to be submitted to the jury, and it is purely one of law upon which the Court can act.

In *Blank v. Coffin,* 20 Cal. (2d) 457 (126 P. (2d) 868), the Supreme Court of California enunciated the rule that is here applicable and we believe determinative of this question.

> "Usually, the opposing party introduces evidence as to the nonexistence of the fact in issue, and the jury must then determine the existence or nonexistence of the fact from all the evidence before it. If the evidence contrary to the existence of the fact is clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law. (citing) The jury, however, is the sole judge of the credibility of the witnesses (Cal. Code Civ. Proc., sec. 1847; see cases cited in 27 Cal. Jur. 182, sec. 156) and is free to disbelieve them even though they are uncontradicted if there is any rational ground for doing so. (citing.) In most cases, therefore, the jury is free to disbelieve the evidence as to the nonexistence of the fact and to find that it does not exist on the basis of the inference." (20 Cal. (2d) 461.)

In the recent case of *Nash v. Wright,* 82 Cal. App. (2d) 467 (186 P. (2d) 686), the court set out four rules applicable to the question here involved:

> "Such demonstration will be facilitated by keeping in mind four cardinal rules which are inalienable from a fair consideration of a judgment based upon a directed verdict: (1) On a motion for such verdict the same conditions as to the proof must obtain as on a motion for nonsuit. (2) Upon such motion it is the trial court's duty to give plaintiff's evidence all the value to which

> it is entitled, and ignoring conflicts in the testimony, to indulge every legitimate inference reasonably deducible from the proof in favor of plaintiff. (*Mairo v. Yellow Cab Co.,* 208 Cal. 350, 351 (281 P. 66); *Dieterle v. Yellow Cab Company,* 34 Cal. App. (2d) 97, 98 (93 P. (2d) 171).) (3) Under such motion, *the evidence for the defense must be disregarded,* and if there is any substantial evidence from which the jury can find for plaintiff it is the court's duty to deny the motion. (4) *On appeal from a judgment after directed verdict the reviewing court cannot affirm the judgment if the evidence of plaintiff standing alone would have warranted findings favorable to him* (*Anthony v. Hobbie,* 25 Cal. (2d) 814, 817 (155 P. (2d) 826)), *and only the evidence most favorable to the plaintiff may be examined.*" (Page 470.) (Italics added.)

In considering the probative effect of inferences as against direct evidence introduced by a defendant who moves for an instructed verdict, the court further stated: "But on a motion for an instructed verdict such rule does not authorize the dispelling of inferences by evidence introduced by the defendant." (Page 472.)

In *Lindemann v. San Joaquin Cotton Oil Co.,* 5 Cal. (2d) 480 (55 P. (2d) 870), the Supreme Court of California at pages 503-4 enunciated the same rule:

> "Subject to the exercise of legal discretion, the jury is the sole judge of the weight, effect and sufficiency of the evidence to establish any fact for which it may be offered. The jury is the sole judge of the credibility of the witnesses and *may*

believe all of the testimony of a witness or believe a part and reject parts as it may be convinced of the truth or falsity of such testimony, whether it arises from wilfulness or mistake" (Italics added).

In *Burgess v. Cahill,* 26 Cal. (2d) 320 (158 P. (2d) 393), the same court stated the oft-repeated rule:

"The settled rule is that a court may direct a verdict only when, disregarding conflicting evidence and giving plaintiffs' evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiffs" (pages 321-2).

The Federal Courts have adhered to these general principles. (*Berry v. United States,* 312 U.S. 450, 61 S. Ct. 637, 85 L. Ed. 945; *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 61 S. Ct. 189, 85 L. Ed. 147; *Aetna Casualty & Surety Co. v. Yeatts,* 122 F. (2d) 350 (C.C.A. 4th); *Banks v. Associated Indemnity Corporation,* 161 F. (2d) 305 (C.A.A. 5th 1947); *Simmonds v. Capital Transit Co.,* 147 F. (2d) 570, U.S.C.A., D.C. 1945; *Terminal Railroad Ass'n v. Staengel,* 122 F. (2d) 271 (C.C.A. 8th 1941).)

In *Simmonds v. Capital Transit Co.,* supra, as in the instant case, judgment was granted for defendant notwithstanding the jury's verdict in favor of plaintiff. In reversing the judgment the court stated:

"It requires us, in deciding whether to uphold the verdict of the jury or the judgment of

the Court to balance the weight of the evidence against the judge's determination and in favor of the jury's determination; the question being, not whether there is sufficient evidence in the record to support the judge's findings and decision, but whether there is sufficient evidence, when construed most favorably for the party upon whom the onus of proof is imposed, from which a jury of reasonable men could properly have reached the verdict which was reached. * * *

"It is true that there was conflicting and contradictory evidence and the trial judge was justified in concluding that the evidence preponderated against appellant's allegations and contentions. But that was not the test to be applied upon a motion n. o. v. * * * In other words, construing the evidence most favorably to appellant and giving him full effect of every legitimate inference therefrom—as the law requires—reasonable men might well differ in their conclusions, upon the evidence so considered. No more is required to sustain the verdict against a motion for judgment n. o. v." (Page 571.)

THE JURY HAD THE RIGHT TO CONCLUDE THAT THE VEHICLE WAS BEING USED FOR TRANSPORTATION OF MERCHANDISE PURPOSES.

If we are correct in our conclusion that plaintiffs established a prima facie case, and that the defendant had the burden of proving the affirmative allegations of its answer, and that the jury had the right to disregard all or any part of the testimony of defendant's

witness relating to this defense, our discussion under this title is surplusage.

Assuming without conceding that it is necessary to consider any of the testimony of Warner, it cannot be disputed that where, as here, the case was taken from the jury, it is the duty of the Court to only consider that testimony that is favorable to our position, and indulge in every legitimate inference which may be drawn therefrom.

> (*Burgess v. Cahill,* supra, 26 Cal. (2d) 320 (158 P. (2d) 393).

The opinion of the trial Court states: "Liability does not attach unless the truck, whether alone or with the trailer attached, was actually being used in the transportation of merchandise for hire" (T. 58). This conclusion is not sustained by the provision of the policy relied upon by the defendant. Without at this point discussing the effect of the Railroad Commission endorsement, we again call attention to this provision.

> "The automobiles described are and will be used only for transportation of merchandise *purposes* and will be operated as follows, and this insurance covers for no other use or operation." (T. 11). (Italics added.)

The words "will be operated as follows" indicate that some description of the mode of operation of the automobiles is thereafter stated in the policy, but on the contrary it is conspicuous by its absence. Hence, we have for consideration the language "will be used only for transportation of merchandise purposes". We have emphasized the word "purposes", as we

take the position that the fair import to be accorded this provision is that the vehicle only need be used for such purposes, which does not mean that it must at all times be physically transporting merchandise.

> "The word 'purpose' means 'that which a person sets before himself as an object to be reached or accomplished; the end or aim to which the view is directed in any plan, manner or execution'."
>
> *In re McCoy,* 10 Cal. App. 116, 129 (101 P. 419).

The testimony of Warner discloses sufficient facts to justify the jury in concluding that at the time of the accident he was using the tractor for transportation of merchandise purposes. On this point attention need only be directed to the fact that he had no definite route, he wildcatted (T. 103). At the time of the accident he was returning after having delivered a cargo, for compensation (T. 106), and he was taking the most direct route back to his point of origin (T. 126). In addition to returning to pay his insurance premium, one of his purposes in returning was to discuss with one Dowdell the hauling of a load (T. 127).

Regardless of what his intent was, the fact remains that at the time of the accident he was returning to his point of origin, even if it be conceded that he had the additional intent to again return to Blue Lakes for his trailer. The liability under a policy of insurance is determined by the use of the vehicle at the time of the accident and not by the intention of the

driver. (*Nichols v. Hawkeye Casualty Co.*, 233 Ia. 792, 10 N.W. (2d) 533).

In his opinion the learned trial judge cites a number of cases in which insurance companies were held liable for uses of the vehicle that were incidental to that permitted by the terms of the policy, and on this subject states:

> "Behind all these cases runs the norm that if the vehicle, at the time of the accident, can be said to be on a mission incident to the object to which its use is limited, the courts will give full effect to the policy." (T. 59.)

Thus, the opinion and the cases cited therein indicate that on a "return trip" after delivering a cargo for compensation the insurance covers even though at the time of the accident there was no merchandise being transported. Commencing with this premise, which of the two trips from Blue Lakes to San Francisco was the return trip? Pausing here to indulge in an assumption for the purpose of illustration, assume that the first return had been uneventful, and the accident occurred on the second return to San Francisco. Under such circumstances, could not the defendant with at least equal plausibility claim that this second trip was not incidental to the permitted use of the tractor, as Warner had previously returned to his point of origin after delivering his cargo?

In any event, can there be any doubt that the question is not one of law for the court to decide, but one for the jury after considering all the facts and

circumstances and drawing all proper inferences therefrom?

If liability attached under the policy, it did so at the time of the accident, and was not affected by the fact that Warner intended to or did in another trip subsequently return for his trailer. Further illustrating the fallacy of the reasoning that forms the basis of the judgment from which we are appealing, assume that Warner had ultimately decided to abandon the trailer, or that he had arranged with someone else for its delivery to San Francisco. Does the liability of the defendant turn on his secret intent or on his overt acts as found by the jury? It is noteworthy that according to his testimony, he often used the tractor alone for the transportation of merchandise (T. 141), and for hauling loaded trailers belonging to others. (T. 138-139.) Moreover, it is significant that the policy insures the tractor and trailer as separate units, and not necessarily in combination with each other. (T. 25, 34.)

In *Ocean Accident & Guarantee Corp. v. Torres,* 91 F. (2d) 464 (C.C.A. 9th 1937), the interpretation there applied is analagous to that which we advocate here. There the appellant contended that the place of the accident and the nature of the service the appellee was performing at the time of the accident refuted the contention that she was performing household domestic service. In disposing of this contention, this Court stated:

> "The appellant, however, argues that: 'Both the place of the accident and the nature of the

service Miss Torres was performing at the time of accident refute a contention that she was performing "household domestic service".' It is pointed out that the place of the accident was four or five miles from the 'household' of the Brinkmans, and it is contended that the nature of the service 'pertained more to trucking or parcel delivery and was not even remotely translatable into "household domestic service".'

"We do not concur, however, in the appellant's assumption that household service must necessarily be performed on the premises occupied by the household. It is the *nature* of the task, and not the *place of performance,* that determines its character. The appellee was returning some tubs that she had used in doing laundry work for her employer, Mrs. Brinkman. In other words, she was doing work incidental to the completion of a household chore." (Page 470.)

In *Journal Co. v. General Acc. Fire & Life Assur. Corp.,* 188 Wis. 140, 205 N.W. 800, the policy there involved restricted the use of the vehicle to the transportation of materials or merchandise. After making a delivery, the accident occurred on a return trip, although there were still a couple of packages left in the truck. In upholding the recovery, the court held that the policy not providing that the transportation of materials or merchandise being the dominant purpose of the use of the vehicle, an incidental use was sufficient to hold the insurer.

Again in *Mitchell v. Great Eastern Stages,* 140 Ohio St. 137; 42 N.E. (2d) 771, 773-4:

"So the purpose in requiring such a policy is, in the last analysis, the protection of the traveling public. To attain this purpose the policy must be given a liberal and broad interpretation in favor of the insured and those claiming under and through the insured * * *.

"Busses operating in the common carriage of passengers must be serviced and repaired and, when not in use, must be housed; so for these purposes they must be taken to service stations, repair shops or garages. Moreover, in accomplishing these ends it is often necessary to leave routes specified in the certificate of public convenience and necessity granted by the commission. Such movements of a bus, not engaged in carriage at that time, would not be limited to specified routes for those might not lead to the proper destination; nor can it be said that a certificated common carrier has ceased to operate as such in doing things incidental to the repairing, servicing and housing of its busses. It would be a very narrow construction to hold that such operation ceased when it became necessary to unload passengers and drive around the square to a garage for repairs. In doing reasonably necessary traveling upon highways to accomplish these incidental things the common carrier is as much engaged in the business of common carriage as when actually transporting passengers upon specified routes. See Rusch v. Mielke, 234 Wis. 380, 291 N.W. 300; Liberty Mut. Ins. Co. v. McDonald, 6 Cir., 97 F. (2d) 497."

In *Smith v. California Highway Indem. Exch.,* 218 Cal. 325 (23 P. (2d) 274), the plaintiffs brought

an action against the insurance carrier to recover a judgment obtained against its insured. The policy provided that the vehicle was to be operated as a jitney bus, and shall not cover any acts that may occur while it is being operated for any other purpose. The accident occurred when the insured was leaving his home and while he was not on the route over which he was authorized to conduct the jitney bus. In upholding a recovery by plaintiff, the court stated:

> "It cannot be doubted that the Chandler automobile was 'maintained' by Davis for the purpose and business of a jitney bus at the time of the accident. It was operated at the time 'in the service of the subscriber as a jitney bus * * * within the city and county limits of the city of San Francisco', and it may not fairly be said that the car was at the time operated for any other purpose than that of a jitney bus. Necessarily Davis was required to keep the car somewhere and it was kept at his home which was the place specified in his operator's permit where it was to be kept and which was in the vicinity of the Twenty-ninth and Mission terminus of the route. At the time of the accident he was operating, using and maintaining his car with the equipment, plates and badge placed and displayed as required by local regulations. The policy did not specify the particular or any route over which the car should be operated. The limits of the operation thereof were the city and county of San Francisco. We have no hesitancy in concluding that the accident was included within the terms of the policy considered as an independent document." (Pages 327-28.)

The legal effect of the endorsement required by the Railroad Commission that is attached to the policy (T. 89) makes the company liable to the plaintiffs for the damages sustained in this accident whether the vehicle was or was not transporting merchandise, unless the exception numbered 4 therein is applicable.

> "(4) any loss arising out of any operations of the insured except operations authorized or for which authorization is required under the aforesaid statutes".

In other words, if returning to the point of origin after delivering merchandise for compensation with the intent of soliciting and hauling for Dowdell *is an operation authorized or for which authorization is required under the statutes,* the endorsement in itself overcomes the effect of the declaration in the policy upon which defendant relies.

The legal effect of similar endorsements has been discussed in *Travelers Mut. Casualty Co. v. Thornsbury,* 276 Ky. 762, 125 S.W. (2d) 229; *Central Mut. Ins. Co. v. Tartar,* 92 F. (2d) 829, (C.C.A. 6th), and in *Liberty Mut. Ins. Co. v. McDonald,* 97 F. (2d) 497, (C.C.A. 6th). In the case last cited the Court states:

> "Appellant further contends that at the time of the collision Tractor No. 18 and trailer were not being 'operated' in the sense of the statute, since after they had broken down the cargo was removed, and they were simply standing empty on the highway. Without deciding just when the operation of the equipment terminated, it is clear enough that it had not ceased while the unit was

still parked on the highway as a result of disablement."

The language used in the endorsement must be interpreted in the light of its purpose and liberally in favor of the insured.

> "Then again, in construing a writing, all parts are to be considered with reference to each other, and in the case of a contract of insurance, the contract is to be interpreted in the light of its nature in view of its purpose as such, and with a considerable degree of liberality in favor of the insured and against the insurer by reason of it having framed the contract. A risk fairly within contemplation is not to be avoided by any nice distinction or artificial refinement in the use of words."
>
> *Granger v. New Jersey Ins. Co.*, 108 Cal. App. 290, 293 (291 P. 698).

CONCLUSION.

The conclusions of the trial judge and many of the authorities cited by him would be applicable if the order here involved, from which this appeal is taken, had been upon a motion for a new trial. On the hearing of such motion the discretion of a trial judge, and the powers he may exercise, are almost as plenary as they are limited on a motion for directed verdict, or for judgment notwithstanding a verdict, which is here involved.

In view of the fact that he does not directly discuss the difference in his function between acting upon the

order here granted and the motion for a new trial, which he denied, we feel that he was led into error by confusing his prerogative of weighing the evidence on a motion for a new trial with the limited function that he is required to perform on a motion for directed verdict. Notwithstanding that the record and the facts establish the contrary, it is apparent that the trial judge did not intentionally usurp the function of the jury, as in this connection his opinion states:

> "This conclusion still calls for the disposition of the motion for a new trial.
>
> "I realize that this motion could be granted condition on its taking effect only if the judgment notwithstanding the verdict is reversed on appeal.
>
> "However, in this case, the motion for a new trial should be denied. Obviously, if my interpretation of the insurance policy is correct, the jury's verdict is wrong.
>
> "If the jury's verdict is right, it can only be because the case presented a factual situation for their solution.
>
> "If this be so, then—despite what is said in this opinion about the unsatisfactory character of the testimony concerning the nature of the trip on which the accident occurred—I should allow the jury's conclusion upon the facts to stand and not substitute my own for it.
>
> "The motion for a new trial will, therefore be denied." (T. 65-66.)

Following the trial of this cause all of the questions of fact were duly submitted to the jury upon proper instructions of the court, after which the jury unani-

nously brought in a verdict in favor of the plaintiffs for the amounts prayed for in the complaint. The action of the trial court in entering judgment for defendant notwithstanding the verdict in favor of the plaintiffs was erroneous, and said order and the judgment based thereon should be reversed.

Dated, Berkeley, California,
January 7, 1949.

Respectfully submitted,
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